

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5197 IN THE)
NAME OF F. F. GUNNING AND)
G. C. GUNNING)
_____)

FINAL ORDER

On April 1, 1999, the hearing officer for the Idaho Department of Water Resources (the "Department") issued a Recommended Order in the above captioned matter. None of the parties filed a petition for reconsideration, briefs, or exceptions to the Recommended Order. Based on his understanding of the law and the facts in this matter, the Director makes the following Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. On December 4, 1997, the Snake River Basin Adjudication ("SRBA") Court issued a partial decree for water right no. 36-02457 as follows:

Source:	Groundwater
Priority:	September 29, 1961
Rate of diversion:	1.0 cubic foot per second ("cfs")
Point of diversion:	NE1/4 NE1/4 SE1/4 ¹ Section 21, T7S, R16E, Jerome County
Purpose of Use:	Irrigation
Period of use:	April 1 to October 31
Place of use:	118 acres within a 222-acre permissible place of use in parts of Sections 21 and 22, T7S, R16E, Jerome County
Other Limitations:	Use of this right with right no. 36-07760 is limited to a total combined diversion rate of 3.3 cfs and a total combined annual diversion volume of 888 acre feet ("af"). Use of this right with right no. 36-07760 is limited to the irrigation of a combined total of 222 acres in a single irrigation season.

¹ The "1/4" designations will be omitted from subsequent legal descriptions in this order.

2. On December 4, 1997, the SRBA Court issued a partial decree for water right no. 36-07760 as follows:

Source:	Groundwater
Priority:	November 7, 1977
Rate of diversion:	2.3 cfs
Point of diversion:	NESE Section 21, T7S, R16E, Jerome County
Purpose of Use:	Irrigation
Period of use:	April 1 to October 31
Place of use:	221 acres within a 222-acre permissible place of use in parts of Sections 21 and 22, T7S, R16E, Jerome County
Other Limitations:	Use of this right with right no. 36-02457 is limited to a total combined diversion rate of 3.3 cfs and a total combined annual diversion volume of 888 af. Use of this right with water right no. 36-02457 is limited to a combined total of 222 acres in a single irrigation season.

3. On December 30, 1997, the Department issued water right license no. 36-08063A as follows:

Source:	Groundwater
Priority:	February 16, 1982
Rate of diversion:	2.14 cfs
Point of diversion:	NESE Section 21, T7S, R16E, Jerome County
Purpose of Use:	Irrigation
Period of use:	April 1 to October 31
Place of use:	107 acres within a 329-acre permissible place of use in parts of Sections 21 and 22, T7S, R16E, Jerome County
Other Limitations:	Rights 36-02457, 36-07760, and 36-08063A when combined shall not exceed a total diversion rate of 3.3 cfs, a total annual diversion volume of 1107.9 af, and the irrigation of 329 acres.

4. On April 3, 1997, F. F. Gunning and G. C. Gunning² ("applicant") filed Application for Transfer No. 5197 ("application") with the Department seeking to change the nature of use for a total of 0.2 cfs and 55.3 af from parts of three irrigation water rights (36-02457, 36-07760 and 36-08063A) to stockwater and commercial uses at an existing dairy known as Hillcrest Dairy. Hillcrest Dairy is located within the E1/2NE Section 34, T7S, R15E, Gooding

² The Department has been informed that subsequent to the application for transfer and hearing, G. C. Gunning passed away. However, no documentation or Notice of Change of Water Right Ownership have been submitted to the Department.

County, approximately six miles west of the original irrigation use within Section 21, T7S, R16E, Jerome County.

5. The Department published notice of the application, and the application was subsequently protested by the following parties ("protestants"):

City of Wendell
Wendell Recreation District
John and Verla Hall
Noel Briggs
Frank Rost, Jr.

6. On December 10, 1998, the Department conducted a hearing in the matter. The applicant was present and was represented by Patrick D. Brown. The City of Wendell was represented by Craig D. Hobdey. Protestant Frank Rost, Jr. was present and represented himself. Bud Bitterly appeared for the Wendell Recreation District, but chose not to participate as a full party in the hearing. Protestants Noel Briggs and John and Vera Hall did not appear.

7. Issues identified by the protestants include the following:

- a. The proposed changes will injure the rights of the protestants.
- b. The proposed changes will constitute an enlargement in use of the original right.
- c. The proposed changes are not in the local public interest.
- d. The proposed changes are not consistent with the conservation of water resources within the state of Idaho.

8. Exhibits premarked, offered, or accepted as a part of the record include the following:

- a. Applicant's Exhibit 1 - NOT OFFERED
- b. Applicant's Exhibit 2 - NOT OFFERED
- c. Applicant's Exhibit 3 - NOT OFFERED
- d. Applicant's Exhibit 4 - NOT OFFERED
- e. Applicant's Exhibit 5 - NOT OFFERED
- f. Applicant's Exhibit 6 - Statement of G. C. Gunning
- g. Applicant's Exhibit 7 - NOT OFFERED

- h. Applicant's Exhibit 8 - Copy of part of a 7.5 minute U.S. Geological Survey Quadrangle sheet titled "Wendell, Idaho"
- i. Applicant's Exhibit 9 - Notice of Claim to a Water Right - Identification No. A36-07440, Partial Decree for Water Right 36-07722, Partial Decree for Water Right 36-11276, Partial Decree for Water Right 36-11277, Well Driller's Reports (4), Water Measurement Reports (10)
- j. Applicant's Exhibit 10 - Letter dated December 1, 1998 to Pat Brown from Charles E. Brockway together with a well interference analysis and water requirement analysis
- k. Applicant's Exhibit 11 - Order of Partial Decree for Water Right 36-10815 dated March 2, 1998
- l. Applicant's Exhibit 12 - Order of Partial Decree for Water Right 36-15511 dated July 20, 1998
- m. Applicant's Exhibit 13 - NOT OFFERED
- n. Applicant's Exhibit 14 - NOT OFFERED
- o. Applicant's Exhibit 15
 - Order in Case No. 21610 titled James D. Nafziger et al. v. Gooding County et al. dated October 15, 1991
 - Judgment in Case No. 21610 titled James D. Nafziger et al. v. Gooding County et al. dated November 8, 1991
 - Memorandum Opinion & Order Re Defendant's Motion to Dismiss & Plaintiff's Motion For Summary Judgment in Case No. 22808 titled Pieter Deelstra et al. v. Board of Gooding County Commissioners of Gooding County, Idaho dated July 27, 1994
 - Second Amended Order Granting Plaintiffs' Motion for Summary Judgment in Case No. CV 96-00368 titled Pieter Deelstra et al. v. Gooding County et al. dated August 27, 1996
 - Amended Order in Case No. CV 96-00368 titled Pieter Deelstra et al. v. Gooding County et al. dated March 27, 1997
 - Opinion and Order in Case No. CV 97-430 titled Idaho Dairymen's Association, Inc., et al. v. Win Henslee, et al. dated June 17, 1998

- p. Applicant's Exhibit 16 - Partial Decree for Water Right 36-02457 in the name of Tammy D. and Richard B. Van Dyk
- q. Applicant's Exhibit 17 - Partial Decree for Water Right 36-07760 in the name of Tammy D. and Richard B. Van Dyk
- r. Applicant's Exhibit 18 - Water Right License No. 36-08063A in the name of F. F. Gunning and G. C. Gunning
- s. Applicant's Exhibit 19 - Affidavit of Gail Gunning
- t. Protestant's Exhibit A - Findings of Fact and Conclusions Before the Gooding County Planning and Zoning Commission dated March 26, 1998

9. The reported capacity of the Hillcrest Dairy is 1,050 milking cows and 150 non-milking cows. A partial decree in connection with SRBA Claim No. 36-15511 provides water for 400 of the milking cows at the dairy. The application seeks water for the remaining 650 milking cows and 150 non-milking cows (remaining uses). The applicant needs a maximum diversion volume of approximately 56 af of water for the remaining uses at the Hillcrest Dairy to be diverted at a maximum rate of 0.2 cfs. The consumptive use volume of water needed for the remaining dairy uses is approximately 20 af.

10. The water sought for transfer in the application was either withheld from land sold by the applicant to Richard B. and Tammy D. Van Dyk or sold back to the applicant. The land from which water was withheld or sold is more specifically described as follows:

Section 22, T7S, R16E, Jerome County

NESW - 2 acres

NWSW - 8 acres

SWSW - 4 acres

The land from which water was withheld or sold consists of corners that are no longer irrigated by the pivot on the quarter section.

11. A dairy existed at the Hillcrest Dairy site from 1962 to 1987, when the dairy ceased operation due to a federally sponsored dairy buy-out program. From 1991 to 1994, a calf feeding operation for up to 4,500 calves was conducted on the site.

12. On March 2, 1995, the applicant bought the Hillcrest Dairy site. The applicant began to enlarge the facility and reestablish the dairy. The facility enlargement was contested by the City of Wendell, which contended that the site was within the city's impact area and that zoning for the site required certain permits the Gunnings did not have. This zoning issue has been litigated in several cases between Gooding County and various dairy interests.

13. There are approximately 10,000 milking cows within a two-mile radius of Wendell. Most of the dairies are on the west side of town.

14. Overall, the local community generally supports the dairy industry, since the industry creates jobs and contributes to the general economy.

15. The efficiency of the use of water at the Hillcrest Dairy is comparable to other dairies in the area.

16. The Board of Gooding County Commissioners enacted Gooding County Ordinance 62 on February 10, 1997. Among other purposes, the ordinance defines "Confined Animal Feeding Operations" ("CAFOs"), addresses existing CAFOs, provides criteria and procedures for "siting permits", and sets forth criteria for "occupancy certificates."

17. In Civil Case No. CV 97-430, titled Idaho Dairymen's Association Inc., et al. v. Win Henslee, et al., on June 17, 1998, (see Applicant's Exhibit 15), the Fifth Judicial District Court held that Ordinance 62 is invalid in its entirety. This ruling is presently on appeal and cross-appeal.

18. At the hearing, the applicant and protestants stipulated that the matter of zoning was presently on appeal and should not be argued in the Department's administrative hearing on the protested application for transfer, since the Department does not have the authority to decide zoning issues.

19. The field headgate diversion requirement for the irrigation of crops in the vicinity of the Hillcrest Dairy and the Van Dyk property is 4.0 af per acre, and the consumptive irrigation requirement is 3.0 af per acre. The annual field headgate diversion requirement for the irrigation of 14 acres at 4 af per acre is 56 af, and the annual consumptive irrigation requirement for irrigation at 3 af per acre is 42 acre feet.

20. The applicant's expert witness provided testimony that the diversion rate of 0.20 cfs proposed in the application would not be measurable in any wells owned by the City of Wendell or the other protestants.

21. The applicant owns approximately 80 shares of water in the North Side Canal Company, is willing to retain ownership of the shares, and will make the shares available for mitigation or a recharge program to benefit the general area if such a program is established.

22. The City of Wendell alleged that the quality of life in Wendell has decreased due to odors and flies attributable to the Hillcrest Dairy. The city also contended, without supporting evidence, that odor of water from a well owned by the city was attributable to the dairy.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. IDAPA 37.03.08045.01.e.iii (Water Appropriation Rule 45.01.e.iii) provides in pertinent part as follows:

e. Criteria for determining whether the project conflicts with the local public interest. The director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:

iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.

3. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use, and that it will be consistent with principles of conservation of water resources within the state of Idaho.

4. Both the applicant and the protestants have the responsibility of coming forward with evidence regarding matters of public interest about which they are each most cognizant.

5. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

6. The changes proposed in the application will not injure other water rights.

7. The proposed changes do not constitute an enlargement in use of the original right since transfer of the rights for the uses sought in the application do not increase the total rate of diversion, annual volume diverted, or annual volume consumptively used.

8. The proposed changes are in the local public interest provided the applicant complies with planning and zoning ordinances of local government jurisdictions and the environmental requirements of state agencies.

9. The proposed changes are consistent with the conservation of water resources within the state of Idaho.

10. The Department should approve the application with certain conditions and limitations.

ORDER


IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5197 is **APPROVED** subject to the following conditions and limitations:

1. Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.
2. The dairy operation authorized under this approval shall comply with applicable city and county zoning and use requirements.
3. Two points of diversion are located within NENE Section 34, T7S, R15E, Gooding County.
4. The total instantaneous diversion of water from the points of diversion under Transfer 5197 shall not exceed 0.2 cfs nor a total annual combined volume of 56 af.
5. Prior to diversion and use of water under this approval, the right holder shall install and maintain a measuring device on each diversion associated with the dairy and shall annually report the amount of water diverted to the Department.
6. Wastewater from the commercial use authorized under this approval may be applied to irrigated land to satisfy water quality requirements. However, wastewater may only be applied to the lands identified on the transfer, and water shall not be land applied for irrigation use unless it has first been beneficially used in the dairy operation in accordance with this transfer approval.
7. The right holder shall maintain ownership and control of 80 shares of water in the North Side Canal Company for mitigation purposes and shall comply with the terms of mitigation as the Department may determine the terms in the future.
8. The acres which are no longer authorized for irrigation under right nos. 36-02457A, 36-07760A, and 36-08063E are described as follows: 2 acres in NESW, 8 acres in NWSW, and 4 acres in SWSW Section 22, T7S, R16E, Jerome County

9. The remainder of right no. 36-02457 is identified as right no. 36-02457A and is limited to a diversion rate of 0.91 cfs and an annual diversion volume of 386.3 af for the irrigation of 108.6 acres each year within a 212.6-acre permissible place of use.
10. The remainder of right no. 36-07760 is identified as right no. 36-07760A and is limited to a diversion rate of 2.19 cfs and an annual diversion volume of 464.1 af for the irrigation of 211.6 acres each year within a 212.6-acre permissible place of use.
11. The remainder of right no. 36-08063A is identified as right no. 36-08063E and is limited to a diversion rate of 2.05 cfs and an annual diversion volume of 409.6 af for the irrigation of 102.4 acres each year within a 315-acre permissible place of use.
12. Use of rights no. 36-02457A and 36-07760A when combined is limited to the irrigation of a combined total of 212.6 acres in a single irrigation season.
13. Use of rights no. 36-02457A, 36-07760A, and 36-08063E when combined is limited to a total combined diversion rate of 3.10 cfs and a total combined diversion volume of 1,051.9 af for irrigating a combined total of 315 acres in a single irrigation season.
14. The change authorized by this approval shall be accomplished within one (1) year of the date of this order.
15. Failure of the right holder to comply with any condition of approval of this transfer is cause for the Director to rescind approval of the transfer.

IT IS FURTHER hereby ORDERED that the protests of Noel Briggs and John and Vera Hall be **SET ASIDE** for failure to appear at the scheduled hearing.

Signed this 20th day of September, 1999.



KARL J. DREHER
Director